judgment, the transfer of the estate to the first respondent cannot be set aside without resorting to section 340 of the Code and alleging fraud, misrepresentation or the like under subsection (2) thereof in order to defeat the indefeasibility of title of the first respondent by virtue of having obtained the right *in rem* in the estate as the registered owner at the material time. Fraud must not only be pleaded but also particularized in the pleadings. Fraud under the Code means actual and not constructive or equitable fraud. Actual fraud must be proved in order to deprive a purchaser for value of the absolute title conferred by the Code. Actual fraud means dishonesty of some sort proved against the person whose registered title is impeached, or his agents. *Bona fide* mistake or negligence is not fraud and each case must depend on its own particular circumstances. The equitable doctrine of constructive fraud has no application under the provisions of the Code. This is the view adopted by our courts based on the decision in *Waimiha Sawmilling Co. Ltd.* v. *Waione Timber Co. Ltd.*,[18] which followed *Assets Co. Ltd.* v. *Mere Roihi.*[19] The standard of proof required to prove fraud is proof beyond reasonable doubt (see *Mohamed Isa* v. *Haji Ibrahim*[20] and the list of authorities mentioned therein).

On the grounds stated above, I hold under issue D that the transfers of the first, second and third portions of the estate to the first defendant can only be set aside pursuant to section 340(2) of the National Land Code. With regard to issue E, since it has been abandoned, the appellants were not allowed to raise it again in this appeal.

*Appeal allowed.*

Solicitors: *Skrine & Co.; Adnan Sundra & Low; Jackson & Masacorale.*

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## HARDIAL SINGH v. FARIDAH BT. HARON & ORS.

**[O.Cr.J. (K.C. Vohrah J.) 18 April 1988]**

**[Kuala Lumpur – Federal Territory Criminal Application No. CR 54-26-87]**

*Criminal Procedure – Private complainant – Right of appeal and right of audience in a criminal appeal to the High Court – Whether there exists – Whether private complainant in a non-seizable case can appear on behalf of Public Prosecutor – Criminal Procedure Code (F.M.S. Cap. 6), ss. 307(i), 312(i), (ii), 313 & 376(i).*

*Criminal Procedure – Appeal – Reinstatement of – Application for – No notice of appeal hearing given – Whether court has inherent jurisdiction to restore appeal – Whether circumstances made it futile to do so.*

The appellant instituted a private complaint against the respondents, as a result of which charges under the Penal Code were preferred against them. The trial magistrate held that she had no jurisdiction to proceed with the trial of the respondents and thus struck out the summonses against them. The appellant lodged an appeal against the magistrate's decision. On the date of the appeal hearing, the appellant was absent and the High Court therefore dismissed the appeal. The appellant then filed an application to reinstate the appeal stating that he had not been informed by the court of the date of hearing for the appeal. The Deputy Public Prosecutor who appeared for the hearing of the application objected to the application stating that a private individual cannot appear on behalf of the Public Prosecutor in a criminal appeal. The respondents also objected to the application arguing that the appellant, as a private individual, had no right of appeal.

**Held**, dismissing the application: (1) it is clear there is a right of appeal given to a private complainant under section 307(i) of the Criminal Procedure Code save that he cannot appeal where the defendant he prosecutes is acquitted, except with the sanction of the Public Prosecutor. As a corollary, he also has the right of audience in the High Court or on the hearing of the appeal. But where the Public Prosecutor becomes cognisant of the criminal appeal by the private complainant and he decides to intervene in the appeal, the Public Prosecutor then becomes directly involved in the appeal and either the Public Prosecutor on his behalf or any of the persons enumerated in section 378 of the Criminal Procedure Code on behalf of the Public Prosecutor will have the right of audience in the High Court. The Public Prosecutor is the appellant and the private complainant then no longer has the right of audience in the appeal before the High Court;

(2) the Criminal Procedure Code does not have an express provision allowing for the reinstatement of an appeal on the ground that no notice of the appeal hearing has been given to the appellant. However, the High Court does have inherent jurisdiction which can only be exercised in exceptional cases, and then too sparingly, in order to do justice and redress a wrong where there is no express provision to undo a wrong. Accordingly, if an appeal is dismissed solely because the appellant was absent and it can be shown that the appellant was absent at the date of hearing of the appeal because he was not given notice of the date of hearing, the appeal should be restored in the interests of justice;

(3) however, in this case, as only the Public Prosecutor would have the right of audience in the hearing of the appeal if it should be reinstated and as the Deputy Public Prosecutor who appeared on behalf of the Public Prosecutor had opposed the application, it was futile to reinstate the appeal.

*Cases referred to:*

(1) *Municipal Commissioner, Malacca* v. *Teh Chwee Swi* [1971] 2 M.L.J. 274 (not follod).
(2) *Ponniah* v. *Lim* [1960] M.L.J. 152 (distd).
(3) *Re Radha Krishna Naidu* [1962] M.L.J. 130 (distd).
(4) *R.* v. *Schefelaar* [1939] M.L.J. 45 (distd).

(5) *Public Prosecutor* v. *Rudguard* [1939] M.L.J. 56 (cited).
(6) *Public Prosecutor* v. *Datuk Harun bin Haji Idris & Ors.* [1976] 2 M.L.J. 116 (cited).
(7) *Public Prosecutor* v. *Dato Yap Peng* [1987] 2 M.L.J. 311 (refd).
(8) *Long bin Samat & Ors.* v. *Public Prosecutor* [1974] 2 M.L.J. 152 (cited).
(9) *Public Prosecutor* v. *Lim Shui Wang & Ors.* [1979] 1 M.L.J. 65 (refd).
(10) *Kartikram* v. *Emperor* A.I.R. 1937 Nag. 123 (cited).
(11) *Ramballabh Jha* v. *State of Bihar* A.I.R. 1962 Patna 417 (cited).
(12) *Emperor* v. *Nizar Ahmad* A.I.R. 1945 P.C. 18 (cited).
(13) *R.* v. *Baichand* [1952] M.L.J. 229 (consd).

CRIMINAL APPLICATION.

*Foo Lee Hei (Miss)* (Deputy Public Prosecutor) for the Public Prosecutor.

*Faiza Tamby Chik* for the third respondent.

*Cur. Adv. Vult.*

**K.C. Vohrah J.**: On 13 February 1988, I dismissed the application of Hardial Singh for the reinstatement of his appeal. And I now give my reasons for so doing.

In Kuala Lumpur Magistrate's Summons Case No. 95-69 of 1986 the magistrate held she had no jurisdiction to proceed with the trial of the three defendants in the case and she struck out the summonses against all the three defendants. The three defendants, two of them public service officers, had charges under the Penal Code preferred against them as a result of a private complaint laid against them by Hardial Singh.

Hardial Singh, not being satisfied with the decision of the magistrate, lodged an appeal against her decision.

On the date of the hearing of the appeal, the three respondents appeared at the hearing but Hardial Singh was absent. I struck out, in effect dismissed, the appeal. It later transpired, however, that Hardial Singh had not been informed by the court of the date of hearing of the appeal.

Hardial Singh filed an application to reinstate the appeal. The Deputy Public Prosecutor, Miss Foo, who appeared on two dates of the hearing of the application, objected to the application, stating that a private individual cannot appear on behalf of the Public Prosecutor in a criminal appeal under section 378 of the Criminal Procedure Code and citing the cases of *Municipal Commissioner, Malacca* v. *Teh Chwee Swi*[1] and *Ponniah* v. *Lim.*[2] Encik Faiza bin Thamby Chik, who appeared for one of the respondents in the application, also objected to the application arguing that Hardial Singh as a private individual had no right of appeal; only the Public Prosecutor had the right of appeal; and he cited the case of *Re Radha Krishna Naidu*[3] but that case decided that when an accused person is acquitted only the Public Prosecutor may appeal but in the present case the three defendants were not acquitted in the lower court.

I dismissed the application of Hardial Singh for the reinstatement of the appeal as I considered that since a Deputy Public Prosecutor who had appeared on behalf of the Public Prosecutor in the application opposed the application, and it was obvious the Public Prosecutor was not supporting the appeal either, Hardial Singh consequently, as a private party, had no right of audience on the appeal before the High Court even if it was reinstated and therefore it was futile for the appeal to be reinstated.

In arriving at this decision I considered two matters:

(1) whether a private complainant who has appealed against a decision of a magistrate made in a non-seizable case has a right of audience before the High Court on the criminal appeal; and

(2) whether an application can be made by an appellant to reinstate his appeal for hearing where the appeal was dismissed solely because for his non-appearance at the hearing date of the appeal although he was absent through no fault of his.

*Right of audience*

In the matter of the right of audience, I turn first to the case of *Ponniah* cited by the learned Deputy Public Prosecutor. Ponniah was convicted in a magistrate's court for assault in contravention of section 352 of the Penal Code. The prosecution was a private one and on appeal the preliminary point arose as to whether the proper respondent was the complainant or the Public Prosecutor. Thomson C.J. (as he then was) held that under the Criminal Procedure Code it followed from the provisions of section 308 that the only *respondent* to an appeal against conviction and/or sentence of a convicted person is the Public Prosecutor and save as provided for by sections 378 and 379 no one has the right of audience.

It will be noted that in the case it was the defendant who had been convicted who appealed and the question that arose was whether the private prosecutor or the Public Prosecutor should have been the proper respondent; since the Public

Prosecutor was held to be the proper respondent it followed the right of audience belonged to him. But nothing turned on the statutory right of a private person, a complainant in a case before a magistrate, to appeal under section 307(i) and his right, if any, of audience before the High Court in the appeal.

I next turn to the case of *R.* v. *Schefelaar.*[4] Schefelaar was charged before the District Judge at Singapore with having obtained credit from a certain person without informing that person that he was an undischarged bankrupt, an offence under the Bankruptcy Ordinance. He was convicted and sentenced to pay a fine of $100 or three months' simple imprisonment. The Official Assignee, not the Public Prosecutor, appealed against the sentence as inadequate. On the hearing of the appeal, it was objected that the Official Assignee had no right either to appeal or to appear on the appeal.

McElwaine C.J. held that the Official Assignee had a right to appeal under section 302 of the Straits Settlements Criminal Procedure Code (equivalent to section 307 of the F.M.S. Code). He said:

"As the Official Assignee laid the information or complaint in accordance with his duty under section 113 of the Bankruptcy Ordinance he is a person dissatisfied with a sentence pronounced by a District Judge in a criminal case to which he was a party and he is given by section 302 of the Criminal Procedure Code a right of appealing against the sentence."

As to whether the Official Assignee had a right to appear in the appeal, the Chief Justice's attention was drawn to section 307 of the Straits Settlements Code (equivalent to section 313 of the F.M.S. Code) which stated that when the appeal came up for hearing the appellant was entitled to be heard first; the Official Assignee being the appellant, he was entitled to be heard. But section 402(6) of the Code (equivalent to section 378 of F.M.S. Code) provided that no person "shall appear on behalf of the Crown in any criminal appeal other than the Public Prosecutor, the Solicitor-General or by a deputy appointed under subsection (3) or by an advocate authorized under subsection (4)."

While the Chief Justice said he thought "the Crown must be regarded as the prosecutor in this case", he declined to decide on what looked like a conflict between section 307 and section 402(6) of the Straits Settlement Code. The situation was saved as the Official Assignee produced an authorization from the Public Prosecutor to appear on behalf of the Crown in the appeal.

Closer in time, the case *Municipal Commissioner, Malacca,*[1] cited by the learned Deputy Public Prosecutor, would appear to show that only the Public Prosecutor may appear as *appellant* in an appeal where a complainant in a non-seizable case has appealed against the decision of a magistrate. In this case, the respondent was convicted and fined under certain provisions of the Municipal Ordinance by a magistrate but the magistrate refused to make a mandatory order contemplated under the Ordinance. The municipal commissioner filed an appeal in his own name and right under the Straits Settlements Criminal Procedure Code. Sharma J. dismissed the appeal. He said that section 402(1) of the Straits Settlements Criminal Procedure Code (equivalent to section 376(i) of the F.M.S. Code) provided that the Attorney-General shall be the Public Prosecutor and shall have the control and direction of criminal prosecutions and proceedings under this Code. And he continued:

"An appeal to the High Court is a proceeding under the Code. Section 402(8)(ii)(b) (equivalent to section 371 of the F.M.S. Code) creates an exception in that an officer of a government department or local authority can appear and conduct any prosecution for an offence against any written law which it is the duty of the department or authority specially to enforce. That provision, however, is confined to summary non-seizable cases triable in the court of a magistrate. If that provision was not there in the Criminal Procedure Code it would not be competent for an officer of a government or local authority to appear and prosecute a case in which that department or authority might be concerned."

With respect, perhaps in regard to the last two sentences quoted above, section 388 of the Municipal Ordinance was not brought to the attention of His Lordship. Under this section, the commissioner had the power to direct any prosecution for any offence under the Ordinance and an officer of the municipality or police officer could have conducted such prosecution on his behalf.

His Lordship further said that section 402(6) (equivalent to section 378 of F.M.S. Code) of the Straits Settlements Code provided that no person shall appear on behalf of the Public Prosecutor in any criminal appeal other than the Public Prosecutor or the Solicitor-General or by a deputy appointed under subsection (3) or by an advocate authorized under subsection (4) of the Straits Settlements Code.

And His Lordship concluded:

"In view of the fact that it is only the Public Prosecutor who could have appealed in this case I am of the view that the present appeal by the commissioner of the municipality of the town and fort of Malacca is incompetent and it is consequently dismissed."

With respect, I do not agree with the reasoning of the late Sharma J. when in dismissing the appeal he stated that it was only the Public Prosecutor who could have appealed in the case and that the appeal by the commissioner was incompetent; as earlier stated, perhaps section 388 of the Straits Settlements Municipal Ordinance was not brought to his attention and perhaps, too, section 302 of the Straits Settlements Code (equivalent to section 307 of the F.M.S. Code) and *Schefelaar's* case were also not brought to His Lordship's attention. It would appear the commissioner was the complainant in the case and he being a person dissatisfied with "a judgment, sentence or order pronounced by the magistrate" and being a party to the criminal case on which the magistrate pronounced his decision, the commissioner had a right of appeal to the High Court (see *Schefelaar).*

In a non-seizable case where the complainant is a private person he may, under section 380(ii)(c) of the Code, appear in person or by advocate and prosecute for an offence against his own person or property. And under section 307(i) if he is dissatisfied with any judgment, sentence or order pronounced by any magistrate's court in a criminal case to which he is a party he may prefer an appeal to the High Court against such decision.

It will be remembered that not every information given to an officer in charge of a police station under section 107 of Code initiates investigations into it. Where the information relates to the commission of a non-seizable offence section 108(i) directs that such officer "shall refer the informant to a magistrate". And section 108(ii) states that no police officer shall in a non-seizable case exercise any powers in relation to police investigations under Chapter XIII of the Code without the order of the Public Prosecutor. What this means is the Public Prosecutor has the power to direct investigations into a non-seizable case and eventually to decide whether to institute prosecution in respect of it, a power clearly given under section 376(i) of the Code which will be adverted to later. What it also means it that in most non-seizable cases the police do not investigate the alleged commission of non-seizable offences and the Public Prosecutor or his deputies are mostly unaware of such offences even if complaints are laid before magistrates in respect of them. Thus it is seldom that the Public Prosecutor or his deputies are aware of the various private prosecutions in the magistrate's courts much less of appeals filed by complainants which are not appeals against acquittals, unless they are informed of these cases by the complainants or by the defendants/respondents.

If there should be an appeal by a private complainant, the Public Prosecutor or his deputies would be aware of it when the appeal records, which under section 308 are required to be transmitted to the Public Prosecutor, are actually transmitted to them. On receipt of these records, the Public Prosecutor or any of his deputies could decide whether to proceed with the appeal of the complainant since the Public Prosecutor has the control and direction of all criminal prosecutions and proceedings under section 376(i) of the Code to which I shall advert in a short while.

Section 307(i) which provides that "any person who is dissatisfied" with a decision of a magistrate's court may appeal does not mention the Public Prosecutor specifically but it has been held in *Public Prosecutor* v. *Rudguard*[5] that the Public Prosecutor comes under the description of "any person" in section 307 although he is not specifically mentioned therein and he may appeal against inadequacy of sentence passed on an accused where he has pleaded guilty. In *Rudguard's* case, Rudguard pleaded guilty to a charge under section 304A of the Penal Code, a seizable offence, and it is clear the Public Prosecutor was a party to the criminal case satisfying the condition of section 307(i) that a person may appeal provided he was a party to the criminal case in the subordinate court. The question arises whether the Public Prosecutor is a party to a criminal case where the offence is a non-seizable offence and a private person conducts the prosecution under section 380(ii)(c)?

Section 376(i) states that the Attorney-General shall be the Public Prosecutor and shall have the control and direction of all criminal prosecutions and proceedings under the Criminal Procedure Code. As was pointed out by Abdoolcader J. (as he then was) in *Public Prosecutor* v. *Datuk Harun bin Haji Idris & Ors.*[6] (at p. 119) (see also His Lordship's judgment as S.C.J. in *Public Prosecutor* v. *Dato Yap Peng*[7]):

> "This section must certainly be circumscribed by and read subject to and in the light of the provisions of Article 145(3) of the Constitution which in effect only restate and are declaratory of the existing powers and duties of the Attorney-General in relation to criminal prosecutions and proceedings at the date the Constitution was promulgated."

His Lordship stated that "control and direction" in section 376(i) is in respect of all criminal prosecutions and proceedings and not of criminal procedure or of the jurisdiction of courts.

In an earlier case, the Federal Court commented on Article 145(3) (per Suffian L.P. (as he then was)) in *Long bin Samat & Ors.* v. *Public Prosecutor*[8] (at p. 158):

"In our view this clause from the supreme law clearly gives the Attorney-General very wide discretion over the control and direction of all criminal prosecutions. Not only may he institute and conduct criminal proceedings that he has instituted, he may also discontinue criminal proceedings that he has instituted, and the courts cannot compel him to institute any criminal proceedings which he does not wish to institute or to go on with any criminal proceedings which he has decided to discontinue..."

*Long's* case has of course to be read together with the Federal Court cases of *Public Prosecutor* v. *Lim Shui Wang & Ors.*[9] and the Supreme Court case of *Dato Yap Peng.*[7]

Although in a private prosecution a private person or his advocate may conduct the prosecution of a non-seizable offence, the conduct of such prosecution does not pass out from the hands of the Public Prosecutor as the Public Prosecutor under section 376(i) has, subject to the strictures mentioned by Justice Abdoolcader, the control and direction of all criminal prosecutions and proceedings under the Code; and under section 380(ii) in summary non-seizable cases "the Public Prosecutor or a Deputy Public Prosecutor or a police officer may appear and conduct any prosecution". Any of the officers enumerated may step into the shoes of a private complainant and appear and conduct the prosecution of the private summons. And any of these officers may at any stage of trial before a subordinate court before delivery of judgment decline to proceed further with the prosecution under section 254(ii) of the Code.

It is clear that if the Public Prosecutor or any of his officers appears in lieu of the complainant in a private summons and the Public Prosecutor is dissatisfied with any decision of the magistrate he may appeal under section 307(i). The fact that he or any of his officers does not appear does not mean he has relinquished control and direction over the conduct of the prosecution; he has control and direction as to what the next step ought to be after the case is concluded before the magistrate. And he may appeal in lieu of the private complainant. But as was mentioned earlier, the Public Prosecutor or his deputy would not be aware of an appeal by a private person let alone of the private prosecution until he is informed of the case or is served with a copy of the appeal record under section 308. It is unreasonable to infer from the Code that because the Public Prosecutor is unaware of an appeal by a private complainant he has lost the control and direction of the criminal proceedings. The filing of the appeal is but one step in the criminal appeal being heard and a "criminal appeal" is surely embraced by the word "proceedings" in section 376(i) of the Code. Procedurally, however, the Public Prosecutor cannot make objection to the Registrar against an appeal which has been filed by a private complainant. He has to wait for the whole procedure relating to the preparing of the records under section 307 to be completed. The only point in time when he can re-assert control and direction of the criminal appeal would be at the hearing of the appeal before the High Court judge. To my mind the Public Prosecutor, as a matter of public policy, should as far as possible have the control and direction of all criminal appeals in the role of appellants where private complainants have filed appeals lest the personal vindictiveness of private parties obsure the merits of the appeals. As was pointed out by Justice Vivian Bose in *Kartikram* v. *Emperor*[10] (and quoted in *Ponniah*[2]):

"The interests of the Crown and the complainant are not always the same. Private parties often wish to serve their own private ends, and criminal proceedings are not primarily designed for that. It would be unfortunate to allow private passions and prejudices to creep into the conduct of a criminal trial, when it can be avoided. It would be even more undesirable to leave the matter in two sets of hands with a possible conflict of interests; undesirable generally from the broad view point of public policy, undesirable also because it would be unfair to the accused. Therefore, if the other side is properly represented by the Crown, not only has the complainant no right of audience, but ordinarily he should not be allowed to appear at all."

Though the above observation was quoted by Thomson C.J. in *Ponniah*[2] in the context of the Public Prosecutor standing in the shoes of the respondent I think the observation of Vivian Bose J. is also relevant in the context of the Public Prosecutor standing in the shoes of an appellant who was the complainant in a private summons before the magistrate.

To sum up. What needs to be borne in mind is the distinction between the right of appeal and the right of audience in the High Court. It is clear there is a right of appeal given to a private complainant under section 307(i) save that he cannot appeal where the defendant he prosecutes is acquitted except with the sanction of the Public Prosecutor (see section 306). It seems to me that if he has a right of appeal, as a corollary, he also has the right of audience in the High Court on the hearing of the appeal otherwise the right of appeal becomes an illusory right if there is no one to represent the appellant in the High Court. But where the Public Prosecutor becomes cognizant of the criminal appeal by the private complainant and he decides to intervene in the appeal (and the Public Prosecutor by section 376 has the control and direction of all criminal proceedings which include

criminal appeals) the Public Prosecutor then becomes directly involved in the appeal and in that case either the Public Prosecutor on his behalf or any of the persons enumerated in section 378 on behalf of the Public Prosecutor will have the right of audience in the High Court. The Public Prosecutor steps into the shoes of the private complainant *qua* appellant; the Public Prosecutor is the appellant and the private complainant then no longer has the right of audience in the appeal before the High Court.

*Reinstatement of appeal*

I now come to the matter of the application for reinstatement of appeal.

Under section 312(i) of the Code as soon as the date of the hearing of the appeal has been fixed "the Registrar shall give to the parties notice of the hearing of the appeal". Under section 313 when the appeal comes up for hearing "the appellant, if present, shall be heard first ..." The appellant can only be present if he had been given notice of the hearing date – he should have been given notice of it by the Registrar in the first place. And section 313(ii) of the Code has to be read in this context.

Although section 313(ii) does provide that if "the appellant does not appear to support his appeal the court may consider his appeal and may make such order thereon as it thinks fit" it seems to me, that where it is very clear there was a failure to send the appellant notice of the hearing of the appeal, the court is not empowered to consider his appeal. I wish to place on record that I am only considering the matter on the very narrow ground that it is absolutely clear that no notice of hearing at all was sent out by the court to an appellant, as in this case.

In the present case, I did not consider his appeal on its merits. I dismissed the appeal, as I stated earlier, because the appellant was absent. But I was not aware at that time that he had not been given notice of the date of hearing the appeal. There is no express provision in our Code to deal with the matter. In India, however, several cases (see *e.g. Ramballabh Jha* v. *State of Bihar*,[11] *Emperor* v. *Nizar Ahmad*[12]) have shown that the High Court may re-hear the appeal in exercise of its inherent powers under section 561A of the Indian Criminal Procedure Code.

Our Code not only does not have an express provision allowing for re-instatement of an appeal on the ground mentioned earlier. It also does not have a section equivalent to section 561A of the Indian Code relating to inherent powers of the court. On the other hand, it would be in vain to have an express provision under section 312(ii) that notice of the date of hearing shall be given to a party to an appeal and notice is given and it would nullify the right of audience, under section 313(1), of the appellant before the High Court on the date of hearing when it is clear he would not be able to avail himself of that right because he had no notice of the hearing date. Could the High Court, notwithstanding the absence of an express provision of law to that effect, in the course of the administration of justice restore such an appeal to redress a wrong?

In *R.* v. *Baichand*,[13] Spenser Wilkinson J. (as he then was) had to deal with the question as to what to do with property (which he called "innocent goods") produced before the magistrate which was not the subject matter of a customs offence with which the respondent was charged but acquitted. The magistrate had returned the goods to the respondent. His Lordship ordered the innocent goods to be returned to the customs authorities and said:

> "There being no provision in the Customs Enactment enabling the court to deal with goods which have been seized but are not liable to seizure and no provision in the Criminal Procedure Code (*i.e.* the Straits Settlements Criminal Procedure Code (Cap. 21)) enabling a criminal court to transfer the ownership or possession of innocent goods I come to the conclusion the only course open to the magistrate in the present case was to order the return of the exhibits to the authority which had produced them, namely, the customs authorities."

In making such an order he invoked the inherent jurisdiction of the court though on very narrow grounds:

> "I think it is clear that as the court has jurisdiction to order anybody to produce a thing before it, it must have inherent jurisdiction to deal with it when the case is over; but I agree that unless the owner or person in possession consents to some other course, it must return, in due course, to the person who produced it. I do not think its inherent jurisdiction can go beyond this because otherwise it would be in fact adjudicating upon rights of property, which is normally a matter for the civil court."

It appears to me that the High Court does have inherent jurisdiction which can only be exercised in exceptional cases, and then too sparingly, in order to do justice and redress a wrong where there is no express provision to undo a wrong. In the circumstances if an appeal was solely dismissed because the appellant was absent and it can be shown that the appellant was absent at the date of hearing of the appeal because he was not given notice of the date of hearing, the appeal should be restored in the interests of justice.

In this case, however, although it has been shown that indeed the applicant was not, as appellant, given notice of the hearing date and was consequently absent at the date of hearing of the appeal and the appeal may be reinstated, the Public Prosecutor through the Deputy Public Prosecutor has intervened to object to the reinstatement of the appeal. It is manifestly clear the Public Prosecutor will not be supporting the appeal on the merits of the case if it should be reinstated. Only the Public Prosecutor would have the right of audience in the hearing of the appeal if it should be reinstated. Accordingly, I found it futile to reinstate the appeal and I dismissed the application.

*Application dismissed.*

Solicitors: *Faiza & Co.*

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## MALAYSIAN INTERNATIONAL MERCHANT BANKERS BHD. v. G & C SECURITIES SDN. BHD. & ANOR.

**[A.C.J. (Shankar J.) 28 March 1988]**

**[Kuala Lumpur – Suit No. C23-1657-86]**

*Banking – Loan secured by charge and guarantee – Whether creditor bank can commence legal proceedings against borrower/chargor and guarantor before realization of security.*

*Contract – Guarantee – Loan secured by charge and guarantee – Guarantor sued by creditor before realization of security – Whether possible.*

The plaintiff bank gave a loan to the first defendant and by way of security, the first defendant executed a charge in its favour. The second defendant, who was the director of the first defendant, also executed a written guarantee for the repayment on demand of all sums owing by the first defendant. Subsequently, the loan was not repaid in accordance with the wishes of the plaintiff and the plaintiff initiated an action against the first and second defendants for the repayment of the debt. The Senior Assistant Registrar gave summary judgment for the plaintiff and the defendants appealed against this decision.

The defendants contended, *inter alia*, that the effect of article 11.03 of the charge document was that the plaintiff bank was obliged to have the charged properties sold first and only then was it entitled to sue the first or second defendant for the balance.

**Held**, dismissing the appeal: article 11.03 of the charge document does not impose any such obligation upon the plaintiff bank. It was open to the plaintiff bank to proceed simultaneously against the second defendant as well, as clause 3 of the guarantee provided that all monies due from the first defendant could nevertheless be recoverable from the second defendant as principal debtor and clause 4 provided that the guarantee was in addition to and not a substitution for any other rights which the plaintiff bank may have had under the charge.

*Cases referred to:*

(1) *Perwira Habib Bank* v. *Gemintan & Ors.* K.L. High Court Civil Suit No. 1107 of 1986 (unreported) (refd).

(2) *Bank Bumiputra Malaysia Bhd.* v. *Esah bte Abdul Ghani* [1986] 1 M.L.J. 16 (refd).

APPEAL FROM REGISTRAR'S DECISION.

*Too Hing Yeap* for the plaintiff/respondent.

*A. Kanesalingam* for the defendants/appellants.

*Cur. Adv. Vult.*

**Shankar J.**: This is an appeal by the defendants against the decision of the Senior Assistant Registrar giving the plaintiffs summary judgment.

On 14 December 1982, the plaintiffs (the bank) gave a loan to the first defendant (the company) of $665,000. By way of security, the company executed a charge in favour of the bank. The money was required to carry out a project to build three bungalows on three lots of land. All three lots were the subject of the charge. The same day the charge was executed, the second defendant who was the director of the company executed a written guarantee for the repayment on demand of all sums owing by the company. Thereafter, monies were advanced but evidently the loan was not repaid in accordance with the wishes of the bank. On 31 March 1986 they claimed that there was due and owing to them by way of balance of principal and interest thereon the sum of $335,958.52. The bank through their solicitors demanded the repayment of the debt by A.R. registered letters from the first and the second defendants. But the defendants failed to pay and the bank's solicitors initiated this action against the company and the second defendant.

Shortly after appearance was entered, the bank filed the application for summary judgment. In the affidavit in support of the application, the bank exhibited the guarantee and a statement of account certified by the bank manager setting out the balance of principal and interest owing by the defendants. When the matter first came up before the Senior Assistant Registrar on 12 December 1986, counsel for the defendant took the point that the application was irregular because the bank had not exhibited the basis of their claim against the company. So plaintiffs' counsel requested an adjournment to file this evidence. The adjournment